

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE COMMISSIONER OF COMMERCE

In the Matter of Cosmetology License  
Applicant Robert Timothy Holmes

FINDINGS OF FACT, CONCLUSIONS,  
AND RECOMMENDED DECISION

The above-entitled matter came on for hearing before Administrative Law Judge George A. Beck at 9:30 a.m. on Thursday, July 8, 2004, at the Office of Administrative Hearings, 100 Washington Avenue South, Suite 1700, Minneapolis, MN 55401.

The applicant, Robert T. Holmes, 164 West Ideal Street, Duluth, MN 55811, appeared representing himself. Michael J. Tostengard, Assistant Attorney General, Suite 900, 445 Minnesota Street, St. Paul, MN 55101-2127, represented the Department of Commerce. The record closed on the date of the last written submission by a party, August 12, 2004.

**NOTICE**

This report is a recommendation, not a final decision. The Commissioner of Commerce will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Glenn Wilson, Commissioner, Minnesota Dept. of Commerce, 85 Seventh Place E., Suite 500, St. Paul, MN 55101 to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. In order to comply with this statute, the Commissioner must then return the record to the Administrative Law Judge within 10 working days to allow the Judge to determine the discipline to be imposed. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

### **STATEMENT OF ISSUE**

Should the application of Robert T. Holmes for a cosmetology license be granted or denied in light of his criminal convictions?

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

### **FINDINGS OF FACT**

1. On August 16, 2002, Robert Holmes submitted an application for a cosmetology license to the Department of Commerce.<sup>[1]</sup> The application disclosed that he had been convicted of criminal offenses. Mr. Holmes included with the application a consent to release of confidential information by the Department of Corrections concerning his criminal history.<sup>[2]</sup>

2. Mr. Holmes, age 44, is married and owns a home in Duluth. He has seven children, including a daughter Angelica, age 6 and a son, Timothy, age 13.<sup>[3]</sup>

3. Mr. Holmes completed a one-year course in cosmetology at a cosmetology school in Duluth. He received a cosmetology course completion certificate on July 31, 2002.<sup>[4]</sup>

4. On June 5, 2000, Mr. Holmes was convicted of criminal sexual conduct in the third degree and sentenced to 28 months in prison.<sup>[5]</sup> The conviction resulted from an incident on November 18, 1997 during which Mr. Holmes had sexual intercourse with a 15-year-old girl who told police that it was against her will.<sup>[6]</sup> Charges alleging force or coercion on the part of Mr. Holmes as well as charges of false imprisonment and furnishing alcohol to a minor were dismissed, however.<sup>[7]</sup>

5. Mr. Holmes was released from prison on April 6, 2001 on supervised release and completed the Bethel Work-Release Program on June 10, 2001. On August 24, 2001 his release was restructured so that he was required to enter and successfully complete the Bethel Work-Release Program along with chemical dependency programming and he was placed under intensive supervision. The restructuring was the result of his use of cocaine and failing to successfully complete sex offender programming and AOD programming.

6. Mr. Holmes completed the work-release program on October 22, 2001 and chemical dependency programming on December 13, 2001.

7. On July 3, 2002 Mr. Holmes' release was again restructured for violating his condition to complete sex offender programming. Mr. Holmes began sex offender treatment on July 16, 2002.

8. On August 29, 2002 he successfully completed the after-care program at Port Rehabilitation but continued to attend weekly AA and NA meetings.<sup>[8]</sup>

9. Mr. Holmes was subsequently arrested on September 11, 2002 for failing to maintain contact with his agent and failing to refrain from the use of intoxicants. Mr. Holmes was returned to the beginning of phase three of intensive supervised release and directed to have a chemical dependency assessment.<sup>[9]</sup>

10. Mr. Holmes was subsequently returned to the correctional facility at Lino Lakes for another violation of his release. He remained at that facility until approximately two weeks prior to the contested case hearing in this matter. Mr. Holmes is again presently on intensive supervised release and is engaged in sex offender treatment at his own expense.

11. His psychologist is of the opinion that Mr. Holmes would not be a threat to his female clients and that his risk of further sexual misconduct is low.<sup>[10]</sup>

12. By a letter dated October 25, 2002, the Department of Commerce advised Mr. Holmes that his application for licensure as a cosmetologist operator was denied. At that time he was incarcerated in the Lino Lakes Correctional Facility. The letter advised Mr. Holmes of his right to a contested case hearing.<sup>[11]</sup> Mr. Holmes filed a written request for a contested case hearing on November 8, 2002.<sup>[12]</sup> He asked that the hearing be delayed until he was released from the correctional facility.

13. Mr. Holmes has an extensive criminal history prior to his conviction for criminal sexual conduct in the third degree. He has also been convicted of burglary in 1977, theft in 1978, retail theft in 1978, theft between \$300 and \$10,000 in 1979, burglary in 1979, possession of burglary tools in 1982, criminal damage to property in 1983, residential burglary in 1983, retail theft in 1985, armed violence and aggravated battery in 1986, and burglary in 1990.<sup>[13]</sup> Additionally, he was convicted of driving under the influence, driving after revocation and criminal vehicular operation resulting in bodily harm in 1998.<sup>[14]</sup>

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

## **CONCLUSIONS**

1. The Commissioner of Commerce and the Administrative Law Judge have jurisdiction in this matter under Minn. Stat. § § 45.027 and 14.50.

2. The applicant was given timely and proper notice of the hearing in this matter by the Department.

3. The Department has complied with all relevant substantive and procedural requirements of statute and rule.

4. The burden of proof in this proceeding is upon the applicant.

5. Under Minn. Stat. § 45.027, subd. 7(4) the Commissioner may deny a license where:

“(4) The person has engaged in an act or practice, whether or not the act or practice directly involves the business for which the person is licensed or authorized, which demonstrates that the applicant or licensee is untrustworthy, financially irresponsible, or otherwise incompetent or unqualified to act under the authority or license granted by the Commissioner.”

6. That the applicant has failed to demonstrate by a preponderance of the evidence that he is presently in compliance with Minn. Stat. § 45.027, subd. 7(4).

7. Minn. Stat. § 45.027, subd. 10 provides that chapter 364 of Minnesota Statutes does not apply to an applicant for a license where the underlying conduct on which the conviction is based would be grounds for denial, censure, suspension, or revocation of the license.

8. Minn. Stat. § 364.03 provides that no person shall be disqualified from a licensed occupation due to a prior conviction of crime unless the crime directly relates to the occupation for which the license is sought.

9. That the crimes for which the applicant has been convicted, in particular, criminal sexual conduct in the third degree, relate to licensure as a cosmetologist.

10. Among the items mentioned as evidence of rehabilitation under Minn. Stat. § 364.03, subd. 3 are that one year has elapsed since release, completion of probation or parole supervision and the length of time elapsed since the crimes.

11. That the applicant has not proved sufficient rehabilitation and present fitness to perform the duties of a licensed cosmetologist.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

### **RECOMMENDATION**

IT IS HEREBY RECOMMENDED: That the application of Robert T. Holmes to be licensed as a cosmetologist be denied.

Dated this 12th day of August 2004.

s/George A. Beck  
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GEORGE A. BECK  
Administrative Law Judge

Reported: Taped  
No Transcript Prepared

### **MEMORANDUM**

The Commissioner of Commerce is authorized to reject an application for a cosmetology license where it is determined that the applicant engaged in an act or practice which demonstrates that the applicant is untrustworthy, financially irresponsible or otherwise incompetent or unqualified to act as a cosmetologist. The applicant has the burden of proof to demonstrate that he is qualified for the license.

The Department points to the applicant's criminal offenses and particularly his conviction for criminal sexual conduct with a 15-year-old female victim as a disqualifier for licensure. The Department staff suggests that the applicant would have access to personal information from clients including credit card information and points out that a large number of women are employed as cosmetologists and are clients. The Department feels that the applicant has not yet demonstrated rehabilitation since he has been released from prison only two weeks prior to the hearing and is presently on intensive supervised release for 12 months. It notes that the applicant has had problems with cocaine leading to his being returned to prison and suggests that successful completion of his release, presently set for April of 2006 would be a good indication of rehabilitation.

The applicant points out that seven years have elapsed since his sex offense and that he has never been classified higher than Level I upon his release from a correctional facility. He suggests that a cosmetologist has no more access to information than any other person intent upon committing a crime. He points out that he is getting help through therapy for his sex offense and that he has completed chemical dependency treatment. His psychologist believes that his risk for further sexual misconduct is low. He seeks a chance to practice a trade for which he has completed school and argues that he is rehabilitated and that he needs to support his family.

There is no doubt, as the applicant's psychologist points out, that employment in his chosen career would likely act to support Mr. Holmes in his efforts to be well-adjusted and stable. What the Commissioner must determine, however, is whether the applicant's criminal sexual misconduct makes him unqualified to be licensed. That misconduct along with the applicant's recent drug use, provides cause for concern in light of the nature of a cosmetologist's clientele. The record does not permit a conclusion at this point that Mr. Holmes meet the statutory requirements.

The Department points out that the rehabilitation guidelines set out in Chapter 364 do not bind the Department in light of the later exemption in Minn. Stat. § 45.027, subd. 10. The question of whether there is sufficient evidence of rehabilitation to justify

a conclusion that the applicant would be trustworthy and qualified to act as a licensed cosmetologist was addressed at the hearing, however. One of the factors listed in Chapter 364 as evidence of rehabilitation is that one year has elapsed since release or completion of parole supervision. In this case, Mr. Holmes was last released only in June 2004 and remains on intensive supervised release for 12 months. His parole will not end until April 2006. Of particular concern is that he has not yet demonstrated an ability to comply with the terms of release since his first release from prison in April of 2001. While he had some successes (completion of a work release program, a chemical dependency program and aftercare) he has also used cocaine and intoxicants and failed to maintain contact with his agent, which led to his return to prison.

The Department's position, that the applicant has not yet established rehabilitation necessary to support licensure, is reasonable given the record in this case. Mr. Holmes has an extensive criminal history (although much of it was in the 1970s and 1980s) and has not yet demonstrated an ability to comply with the terms of his release. It appears that the Department is willing to reconsider this matter if Mr. Holmes successfully completes his parole. He has taken a number of positive steps towards that goal and hopefully that will continue.

**G.A.B.**

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<sup>[1]</sup> Ex. 1, p. 1-2.

<sup>[2]</sup> Ex. 1, p. 3.

<sup>[3]</sup> Ex. 1, p. 35.

<sup>[4]</sup> Ex. 1, p. 4.

<sup>[5]</sup> Ex. 1, p. 22.

<sup>[6]</sup> Ex. 1, pp. 10-11.

<sup>[7]</sup> Ex. 1, p. 12.

<sup>[8]</sup> Ex. 1, p. 18.

<sup>[9]</sup> Ex. 1, p. 20.

<sup>[10]</sup> Ex. A.

<sup>[11]</sup> Ex. 1, p. 25.

<sup>[12]</sup> Ex. 1, p. 26.

<sup>[13]</sup> Ex. 1, p. 15.

<sup>[14]</sup> Ex. 1, p. 14.